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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

DATE: JUL 20 2011

OFFICE: TEXAS SERVICE CENTER

FILE [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research associate at the Massachusetts [redacted]. The petitioner asserts that [redacted] requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits arguments from counsel and two witness letters.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on September 1, 2009. Eight witness letters accompanied the petition, offering further discussion of the petitioner's work and its significance. Six of the witnesses worked with the petitioner while he was a doctoral student at Tulane University; the other two worked with him during his subsequent postdoctoral work at MIT. Professor Ulrike Diebold, who supervised the petitioner's doctoral studies at Tulane, stated:

> [The petitioner's] project was to study the surface of SnO_2 (tin [di]oxide). . . . Tin dioxide is used in a variety of technological applications, e.g. gas sensors, catalysts,

energy-saving windows, etc. It is also used in transparent electrodes, one of the key components of modern electronic devices. During his PhD work [the petitioner] completed an extensive and challenging study of SnO_2 by applying . . . state of the art surface science techniques such as the Scanning Tunneling Microscopy and Spectroscopy (STM/STS), X-ray Photoemission Spectroscopy (XPS), and Scanning Electron Microscopy (SEM). He has also developed an advanced expertise and a highly valuable skill set in his area of research.

. . . [H]e was able to characterize the surface morphology of $SnO_2(101)$ nanobelts (NB), a novel nanoscale material for chemical gas sensing and nanoscale electronics. He was the first to obtain atomically resolved STM images of the top layer of metal oxide nanobelts, which revealed a $SnO_2(101)$-(1x1) structure.

The other important discovery he made is the nucleation of (quasi-)one-dimensional (1D) systems, supported on a surface. . . . Such one-dimensional conductors are important building blocks for nanometer-scale devices on the smallest scale. . . . To the best of my knowledge, [the petitioner's] finding was the first observation of 1D metal-on-oxide growth.

[redacted] an assistant professor at MIT who supervises the petitioner's work there, stated:

The particular research area that I have hired [the petitioner] in my laboratory for is focused on perovskite type mixed ionic-electronic conductor oxides, which are widely used as Solid Oxide Fuel Cell (SOFC) cathodes. SOFCs are very attractive to clean fuels production, as well as for co-generation of electricity and synthetic liquid fuels by coupling to solar or nuclear plants. A major obstacle to a widespread use of SOFCs thus far is the cathode performance at lowered temperatures. . . . [A] fundamental understanding of the surface electronic and chemical state and its relation to the oxygen reduction at the atomistic level is essential for the development of cathodes with enhanced electrocatalytic activity. . . .

[The petitioner's] specific research objective is to identify and control the correlations between the surface composition and crystallographic structure of dense thin-film cathodes to their surface electronic structure, defect chemistry, and electronic and ionic exchange characteristics. . . . His findings are expected to enable cheaper, more durable and more efficient materials for SOFCs. For the first time in the field, [the petitioner] was able to measure the electronic structure of the SOFC dense thin-film cathode surfaces under harsh reactive and high temperature conditions, by using high resolution scanning tunneling microscopy and spectroscopy. These are very challenging and demanding experiments, and [the petitioner's] experimental and theoretical skills have been important to the accomplishment of our research objectives. His findings provide critical insights for the correlations between the structure, chemistry, and electronic state of SOFC cathode surfaces. Quantifying and

> elucidating such correlations, as in [the petitioner's] work, will be the key to rationally designing efficient cathode materials and structures for SOFCs in a clean energy world.

The remaining witnesses, all the petitioner's mentors or collaborators, described the above projects in varying degrees of technical detail. The witnesses praised the petitioner's skills, and stated that his contributions represent significant advances in alternative energy technology. Because the witnesses all discuss the same projects, repetition of the details would be redundant in this decision, but the AAO has taken their favorable assertions into consideration.

The petitioner submitted copies of nine published articles and materials from several conference presentations reporting his work at Tulane and MIT, but no objective evidence to show the significance of the petitioner's work relative to that of others conducting similar research. The petitioner also submitted background materials which establish the substantial intrinsic merit and national scope of the petitioner's research.

On October 27, 2009, the director instructed the petitioner to submit further evidence to meet the guidelines published in *Matter of New York State Dept. of Transportation.* In response, counsel discussed the reputation of MIT and the credentials of several of the witnesses who had provided letters submitted with the original submission. Counsel noted that one witness, Tulane Professor John Perdew, "is one of the most cited scientists in Physics," and one of Prof. Perdew's articles "was the most-cited of all physics papers in the world published January 1, 1994 to June 30, 2004. The article alone has been cited approximately 6000 times." By making these arguments, counsel acknowledged that citations are an objective measure of a researcher's impact. Nevertheless, counsel remained silent about the citation history of the petitioner's own work.

The petitioner stated that the labor certification process cannot account for "nonquantifiable" traits such as "demonstrated expertise" or "profound knowledge," which are "qualities that set apart those with exceptional ability from those with standard ability." As explained elsewhere in this decision, Congress specified that exceptional ability is not, by itself, grounds for a national interest waiver, because aliens of exceptional ability are typically subject to the job offer requirement. In terms of identifying the petitioner's "nonquantifiable" attributes, statements from witnesses selected by the petitioner can illuminate and explain the petitioner's evidence, but cannot by themselves establish the petitioner's eligibility for the waiver.

The petitioner submitted numerous exhibits with his response to the director's notice. Many of these exhibits, however, consist of background materials that do not relate specifically to the petitioner. At best, these exhibits further establish the intrinsic merit and national scope of the petitioner's work; they cannot and do not show that it is in the national interest for the petitioner, rather than a qualified United States worker, to be performing this work. The remaining materials are copies of previously submitted exhibits.

The director denied the petition on December 4, 2009. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had failed to meet the third prong of the national interest test in *Matter of New York State Dept. of Transportation*. The director quoted from that decision:

> It cannot suffice to state that the alien possesses useful skills, or a "unique background." . . . [R]egardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

Id. at 221. The director also stated that "independent acknowledgment of the beneficiary's work carries far greater weight than letters that were solicited as evidence for the I-140." The director added that all of the petitioner's witnesses were the petitioner's mentors and collaborators, and therefore do not show impact or influence outside of that circle.

On appeal, counsel protests that the director's request for evidence "spoke only in generalities – stating burdens of proof – and never mentioned a specific deficiency in the petition or challenge to the validity of a single piece of supporting evidence." The "generalities" derived from *Matter of New York State Dept. of Transportation*. If the director did not request any specific pieces of evidence, such as a missing form or certificate, it is because there are no fixed evidentiary requirements for the waiver. Rather, the standards are flexible, to accommodate the different specifics of each waiver application.

Counsel protests the director's "not providing any weight to the expert opinion letters." The opinions of experts in the field are not without weight and the AAO has considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as the AAO has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795.

Counsel cited appellate decisions from 2000, concerning the value of witness letters. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner submits two further witness letters on appeal. [redacted] of the University of Nevada, Las Vegas, who has "closely collaborated with [redacted]" states:

> [The petitioner] has applied microscopic and spectroscopic techniques to study materials for SOFCs at high temperatures and in oxygen environments similar to those found in a fuel cell environment. While such studies are already quite

> challenging at room temperature and in ultra-high vacuum conditions, the experiments performed by [the petitioner] reach a completely new level, both in terms of complexity, as well as insights gained into the material, with specific relevance for the actual operating conditions. . . .
>
> [The petitioner's] findings are tremendously valuable to the advancement of surface science in its pursuit to better understand and improve the properties of surfaces and interfaces of energy conversion devices. His publication record is outstanding and his findings represent significant contributions to the field.

[redacted] of Texas A&M University, College Station, stated:

> I have not worked or collaborated with [the petitioner] directly, and therefore believe that my opinion is an independent one. . . .
>
> [The petitioner's] current research topic explores an entirely new frontier in the SOFC cathode research field. . . . [The petitioner's] experimental and theoretical skills have been key towards accomplishing the research objectives. . . .
>
> In research such as that [which] is being performed by [the petitioner] . . . , it is extremely difficult to replace research team members without adverse impact on continuity of productivity.

When considering the claim that the self-petitioning alien is more valuable to MIT than a minimally qualified worker in the same position, and the independence of a witness from Texas A&M University, the AAO cannot ignore that, on January 5, 2010 (the same day the director received the appeal), Texas A&M University filed a nonimmigrant petition on the alien's behalf. USCIS approved that petition, and USCIS records show that the alien now resides in Texas. The question of whether MIT can replace the alien is, therefore, moot, because he has already left MIT, and MIT has already had to replace him.

The record before the AAO does not reveal whether or not the petitioner continues to perform research on SOFCs, which was the narrow area upon which his waiver claim specifically rested. Either way, his departure for a new position highlights a deficiency in the petition. When he filed the petition on his own behalf, the beneficiary was employed in an inherently temporary postdoctoral training position. Whatever his immigration status, the petitioner could not have remained in that position indefinitely. The petitioner did not explain why he required permanent immigration benefits to stay in a temporary position for which he already held qualifying nonimmigrant status.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than

on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.